

McNamara Declaration

Exhibit 26

part 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS LLC,
JOHN WILEY & SONS, INC., and
PENGUIN RANDOM HOUSE LLC

Plaintiffs,

v.

INTERNET ARCHIVE and DOES 1 through
5, inclusive

Defendants.

Case No. 1:20-CV-04160-JGK

EXPERT REPORT OF SUSAN H. HILDRETH

ATTORNEYS' EYES ONLY

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
A. Background and Qualifications.....	1
II. SUMMARY OF OPINIONS	4
III. BACKGROUND ON LIBRARY SERVICES	5
A. The Role of Libraries in the Twenty-First Century	5
B. Print Collection Investment	5
C. Patron Demand for Digital Access	7
1. In-person Visits to Libraries	8
2. Circulation of Digital Items Including Ebooks	10
3. Ebook Availability	11
4. Digital Discovery	14
IV. LEVERAGING LIBRARIES' EXISTING COLLECTIONS TO SERVE THE PUBLIC	16
A. Interlibrary Loans, Special Collections, and the Sharing of Library Resources	16
B. Controlled Digital Lending	19
C. The Internet Archive is a Library that Practices CDL	21
V. LIBRARY FINANCES	22
A. Organization and Funding.....	22
B. Library Budget Trends.....	26
C. Components of Library Budgets.....	28
D. Acquisition Budgets.....	29
VI. PRINT MATERIALS CIRCULATION/ACQUISITION	32
A. Circulation of Print Materials	32
B. Collection Management	34
VII. EBOOK ACQUISTION CHALLENGES	36

A.	Ebook Access Models.....	38
B.	Challenges in Acquiring and Managing Ebook Collections.....	40
VIII.	CDL’S IMPACT ON LIBRARY SPENDING.....	41

I. INTRODUCTION

A. Background and Qualifications

1. My name is Susan H. Hildreth. I have served as a library administrator at the local, state, and federal level during my career spanning over forty-eight years. I am currently working as a library consultant, focusing on library executive recruitment, strategic planning, organizational review, and community engagement. I served as the Interim Director for the Sonoma County, California, Library from July 2018 to March 2019. In my last permanent position, I served as the inaugural Distinguished Practitioner in Residence, a Gates Foundation-funded professorship at the University of Washington Information School designed to infuse curriculum with skill building relevant to the twenty-first century library and bring theory and practice together for an impactful student experience.

2. I also served as the Director of the federal Institute of Museum and Library Services (“IMLS”) from 2011 to 2015. I was appointed to this post by President Barack Obama and confirmed by the United States Senate. In this position, I administered a \$250 million annual budget and worked with library organizations, other federal agencies, foundations, and interested stakeholders to develop partnerships to leverage federal investments in libraries and museums. I also provided advice to the Obama Administration and Congress on information policy and was responsible for the annual national data collection of public libraries and national census of museums. I worked closely with the Federal Communications Commission and the National Telecommunications and Information Administration to ensure that broadband capacity and digital literacy were available for all, with a specific focus on underserved communities and at-risk populations.

3. Following the completion of my term at IMLS, I served as the Aspen Institute Fellow for the Dialogue on the Future of Public Libraries, an initiative funded by the Gates

Foundation. I provided advice to this program that explored and championed new thinking on U.S. public libraries, developing concrete actions to transform public libraries to serve a more diverse, mobile, and connected society, with a specific focus on the impact of the digital revolution on access to information, knowledge, and the conduct of daily life.

4. I served as the State Librarian of California from 2004 to 2009. I was appointed to this post by Governor Arnold Schwarzenegger and confirmed by the California State Senate. In this position, I was responsible for the annual distribution of over \$16 million in federal funding and \$59 million in state funding as well as library service development for the 181 public library systems serving over 37 million residents at that time. I also supervised a \$350 million public library construction bond program and a \$128 million cultural facilities bond program.

5. I have also served as the City Librarian for both the Seattle Public Library and the San Francisco Public Library. Both library systems are widely recognized as international leaders in library programming, service delivery, facility design, and innovation. Prior to these posts, I held a number of leadership positions in public libraries in California and New Jersey. Although I have led large and complex public libraries, I have also worked in small, single-facility organizations and library systems serving rural communities.

6. I have been active in professional library and literacy associations throughout my career. Most recently, I served as the Treasurer of the American Library Association (“ALA”) from 2016 to 2019. ALA is the largest library association in the United States, with 57,000 members, an annual budget of \$45 million, and an endowment of over \$63 million. I also served as President of the Public Library Association, a division of ALA, in 2007, and as President of the California Library Association in 2004. During my career, I have presented and/or

participated with colleagues in a number of professional programs. I served as a founding member and chair of the Library of Congress Literacy Awards Advisory Board from 2012 to 2021 and served as a board member and governance chair for the Reach Out and Read Board, a pediatric literacy intervention program.

7. I have a breadth of experience in the library field, particularly during the impactful transitional years from a primarily print world to the current print/digital balance of all services. I have served on the Advisory Council of the Panorama Project since 2018 and have provided advice on the impact libraries have on book discovery, promotion, and sales. I am thus well-qualified to provide information and expert opinion on libraries and their operations. I have provided my resume (see Attachment A).

8. I have a high-level understanding of the case. I was informed that several major publishers have asserted that the controlled digital lending (“CDL”) model used by the Internet Archive’s Digital Lending Library (“Digital Lending Library”) results in an infringement of copyright. I am being compensated at the rate of \$150 per hour for my time. I have reviewed documents, deposition transcripts in this case, and have interviewed several library professionals (see Attachment B) who have in-depth knowledge of CDL and/or work closely with print and digital acquisitions as well as a wide variety of ebook platforms and aggregators.

9. There are no cases in which, during the past four years, I have testified as an expert at trial or by deposition. My work in this case is ongoing. I reserve the right to supplement my analysis if additional information becomes available to me. I intend to review reports submitted by Plaintiffs’ experts, and I reserve the right to prepare a reply expert report at the appropriate time.

II. SUMMARY OF OPINIONS

10. I have been asked to provide expert opinions regarding library processes, service trends, patron behavior, and library finances, particularly acquisitions and the impacts of ebook licensing models on library services.

11. In brief, my opinions are that:

- In the twenty-first century, libraries strive for improved patron access to knowledge and to adapt to increasing patron demand for digital access. To do so, libraries must leverage their investments in their print collections. See Section III.
- Patrons by and large prefer to browse or sample a title, digital or print, before making the decision to borrow it. See Section III.
- Libraries have shared their physical collections through interlibrary loans and regional resource-sharing for many years. Interlibrary lending is a way for libraries to conserve resources and focus acquisition-based spending on works their patrons are most likely to frequently request. See Section IV.
- The growing practice of CDL by libraries is but one method libraries use to leverage their existing physical collection to better serve the reading population. The Digital Lending Library is one example. See Section IV.
- Library budgets are both limited and finite. Libraries strive to maximize their acquisition budgets to meet patron demand, but acquisition budgets are often one of the few discretionary line items in a library budget and so may be constrained based on other required library expenses. Library budgets for acquisition of works are never large enough to meet patron demand. See Section V.
- As to physical book acquisitions, libraries initially buy multiple copies of popular titles, and then subsequently reduce the number of copies in their collection of a title. Sometimes reduction happens when a physical copy wears out or is damaged, and other times a reduction happens when libraries sell or giveaway additional copies of a title after demand for that title has decreased. Libraries seldom buy replacement copies of a title. Demand for popular titles diminishes rapidly, and one-to-one replacement would not be a good use of a library's limited acquisition budget. Moreover, libraries can and do make small repairs (example: taping a torn page) to damaged physical copies. Only a small percentage of a library's acquisition budget is spent purchasing new replacement copies of a title. See Section VI.
- Ebooks have presented particular challenges for libraries. Patron demand for ebooks has been increasing. But, when libraries pay for the ability to loan ebooks to patrons, libraries pay only for a temporary license. The purchase of ebook

licenses therefore does not add to a libraries' permanent collection. Moreover, ebook collection management requires heavy use of libraries' staff resources. In many cases it takes more staff resources to manage library ebook licensing systems than it does to manage physical collections. See Section VII.

- CDL does not result in less library spending on books. Libraries spend all of their allocation budgets each period. If a library decided not to license a title because digitized print copies are available for borrowing under CDL, a library will use the money it would have spent licensing that title as an ebook on licensing another ebook title—or on purchasing print books. See Section VIII.

III. BACKGROUND ON LIBRARY SERVICES

A. The Role of Libraries in the Twenty-First Century

12. Provision of access to information is the primary goal of the twenty-first century library, yet libraries have expanded far beyond that primary role. Libraries serve as meeting places for community members, workforce development centers for the unemployed or under-employed, family learning centers for literacy support for all ages, telehealth venues for patients who do not have access to personal devices or wifi, and go-to partners for a myriad of services that reflect the needs and aspirations of their communities.

B. Print Collection Investment

13. The primary role of libraries for many years was the development and curation of print collections. These collections were initially developed to provide educational materials to improve the lives of patrons. As communities changed and additional formats of resources evolved, libraries expanded their collections to include recreational reading materials, serials (magazines), children's materials, and varying formats, i.e. paperbacks, audio-visual materials, etc.¹ No matter what the format, libraries have worked to develop collections that present

¹ Michael Kevane & William A. Sundstrom, The Development of Public Libraries in the United States, 1870–1930: A Quantitative Assessment. *Information & Culture: A Journal of History*, 117–144 (2014).

current and balanced viewpoints on a wide variety of critical topics. Collections are developed to address general informational needs of the community yet are also focused on topics that are of *particular interest* to the community. For instance, if the community being served is the headquarters of a specific industry, the collection could reflect deep resources regarding that industry. If the community is the birthplace of a famous individual, materials regarding that person's life could be included in the collection. Library collections are always a balance of materials of general interest and topics that may be of specific interest to the community.

14. Public libraries are distinct from other types of libraries in that their mandate is to serve the public's information needs generally. Public libraries lend materials—including books—to their patrons, and they also maintain collections of reference materials, many of which are not available for check-out. Public libraries typically focus on acquiring and making available materials of general interest to the public and materials that will be popular with patrons.

15. Another key role libraries play is preservation. Many libraries have collections that focus on local history or collections that are unique to their community or region, as noted above. Moreover, libraries are often responsible for maintaining local archives including governmental documents. While libraries can and do preserve physical embodiments of works, libraries also use digitization—particularly in circumstances where the physical condition of a work is deteriorating or the work or its contents are not widely available elsewhere (for example: works in a library's "special collections"). Also, libraries with multiple branches that purchase many copies of titles at a time, will strive to retain the "last copy" when the title has outlived its popularity.

16. Library preservation activity is primarily focused on print collections, either by taking special care of print books and/or digitizing it. Preservation of digital materials is more challenging for public libraries, due to the equipment required for preservation of digital materials as well as the need to monitor and address changes in digital formats and platforms—both of which are expensive.

17. Resource-sharing and convenient borrowing are hallmarks of impactful library services. When libraries share resources, whether a patron is borrowing a mystery or a cookbook, the patron does not have to use or travel to the nearest local branch to obtain the material. Models for regional resource-sharing and cooperative access among neighboring libraries have been prevalent throughout the United States since the early 1970s. As an example, in the greater New York metropolitan region, as long as you live, work, own property, or go to school in New York state, you can obtain a free library card at the New York Public Library (“NYPL,” serving the Bronx, Manhattan, and Staten Island), the Brooklyn Public Library, and the Queens Public Library. With your Queens Public Library card, you can visit NYPL in person or virtually, obtain an ecard or traditional library card, and borrow materials from NYPL.

C. Patron Demand for Digital Access

18. Patron behavior and their interaction with libraries and their resources have changed significantly over the last several years. As the availability of electronic resources has increased, the ability of patrons to access those resources online has also increased. The use of ebooks and digital content increased even more rapidly as a result of COVID-19. Although many libraries have provided ebooks for a number of years, the pandemic accelerated discovery

of digital resources² by eager (and desperate) readers who were stuck at home during the pandemic.

19. Libraries collect many statistics, yet these statistics may not demonstrate all emerging use patterns. For instance, libraries document their total number of registered borrowers but, at least at this point in time, the IMLS, which collects data annually from public libraries, does not differentiate between borrowers who use only electronic resources (digital borrowers), those who use only print resources, and those who use both. In fiscal year (“FY”) 2020 (July 2019 – June 2020), the California State Library (“CSL”)³ began collecting data on whether libraries had issued ecards prior to COVID-19 and during COVID-19. 51.6% of libraries reported issuing ecards prior to the pandemic, and a whopping 90.8% of libraries reported that they began issuing ecards during the pandemic and will continue to do so.⁴

1. In-person Visits to Libraries

20. Over the last ten years, the number of patrons coming into libraries in person has decreased. All U.S. public libraries are required to provide an annual report of statistics to their

² The pandemic also appears to have increased the number of libraries who now offer digital library cards (ecards) so that patrons can sign up to borrow resources online and obtain their traditional library card when they visit their library in person. Some libraries also offer an “instant digital card” that is provided in cooperation with OverDrive. As described by Mr. Steve Potash, founder and CEO of OverDrive, Inc., in his deposition, “Instant digital card is a service select libraries have enabled to provide readers in their communities access to digital books using their cell phone to authenticate them.” Potash Dep. Tr. 94:10–13, Jan. 31, 2022.

³ The CSL provides detailed and in-depth analysis of statistics it collects. Other states do not necessarily provide this level of analysis, and I am most familiar with the statistics collections and trends in California public libraries. Having been responsible for the national data collection program, I know that trends in other states are similar to trends seen in the California data.

⁴ California State Library Statistics Portal, *Summary Report, 2019-2020*, (2022), <https://ca.countingopinions.com/pireports/report.php?bd779312f73ab509cdef26ddf21a92b6&live>.

state library agency, and all the state library agencies are required to provide those statistics to IMLS, where a summary of that data is compiled into the annual Public Libraries Survey. The California State Library, for example, provides information regarding the five and ten-year library use trends. A picture of trends at the national and state level is provided in these annual statistical reports. Please note that the persons represented in this data are the number of persons that are served by a public library. This is a higher number than library patrons as not all persons are registered patrons in a library system. A sample of that data is shown in the chart below:

Fiscal Year	Average library visits per person (national)	Average library visits per person (California)⁵
FY 2020	Not yet available	3.46
FY 2019	3.9 ⁶	4.98
FY 2015	4.28 ⁷	5.88
FY 2011	5.1 ⁸	6.28

21. California State Library trend data shows that per person visits have decreased by half—from 6.28 in FY 2011 to 3.46 in FY 2020. (The national visit statistics are not yet available for FY 2020.) There is little doubt that statistics for FY 2021 visits will demonstrate continued decline in in-person library visits, due to prolonged pandemic-related library closures

⁵ California State Library Statistics Portal, *Library Visits per Capita*, (2022), <https://ca.countingopinions.com/pireports/report.php?4753b73dacc5b971763b4de81b0650f9&live>.

⁶ Michael Pelczar et al., Institute of Museum and Library Services, *Characteristics of Public Libraries in the United States: Results from the FY 2019 Public Libraries Survey 3* (Aug. 2021), <https://www.imls.gov/sites/default/files/2021-08/fy19-pls-results.pdf>.

⁷ Institute of Museum and Library Services, *Public Libraries in the United States: Fiscal Year 2015* viii (July 2018), <https://www.imls.gov/sites/default/files/publications/documents/plsfy2015.pdf>.

⁸ Institute of Museum and Library Services, *Public Libraries in the United States Survey: Fiscal Year 2011* at 16 (June 2014), <https://www.imls.gov/sites/default/files/legacy/assets/1/AssetManager/PLS2011.pdf>.

and related restrictions. Over the past decade, there has been an increased need for libraries to serve their patrons remotely, and the availability of digital resources has enhanced that trend.

2. Circulation of Digital Items Including Ebooks

22. It is also clear that the circulation of digital items has increased significantly over the recent years. The CSL began collecting data on the use of electronic materials in 2012–2013. Data is shown in the chart below:

Fiscal Year	Median Circulation	Average Circulation
FY 2020 ⁹	61,050	447,039
FY 2016 ¹⁰	21,410	224,673
FY 2013 ¹¹	8,912	103,075

23. The median and average circulations for electronic materials are derived from the total electronic materials circulation reported by each library in a fiscal year. In FY 2013, in my experience with libraries, this large disparity between the median and average circulation demonstrates that many libraries had barely begun to build their electronic collections whereas larger institutions with more resources were acquiring electronic resources quickly. In this seven-year period (from FY 2013 to FY 2020), there were significant increases in the circulation of electronic materials.

⁹ California State Library Statistics Portal, *Circulation 2019-20* (2022), https://ca.countingopinions.com/pireports/view_dashboard.php?pkey=8d4d9320c8ce1ae36c764fd90dc05f83&live.

¹⁰ California State Library Statistics Portal, *Circulation 2015-16* (2022), https://ca.countingopinions.com/pireports/view_dashboard.php?pkey=626437c4d376728d7b0313240656d821&live.

¹¹ California State Library Statistics Portal, *Circulation 2012-13* (2022), https://ca.countingopinions.com/pireports/view_dashboard.php?pkey=8d4d9320c8ce1ae36c764fd90dc05f83&live.

24. The IMLS survey has recently begun to separately report electronic circulation from print/total circulation. Data is shown in chart below:

Fiscal Year	Total electronic circulations nationwide in U.S.	Per person electronic circulation
FY 2019 ¹²	343 million	1.1
FY 2018 ¹³	294 million	0.93

25. This data shows there was a 14% increase in ebook circulation *in just one year*.

Additional data on electronic collections is shown below:

Electronic Materials (IMLS)	Ebooks per person
FY 2017 ¹⁴	1.5
FY 2013 ¹⁵	0.4

26. This data shows there was a 74% increase in electronic materials in library collections over a four-year period.

3. Ebook Availability

27. Libraries are one of the first and best examples of sustainable institutions. They are built on the concept of sharing and reuse of materials for the public good. Patrons never “own” materials they access—they have the privilege of using them at no charge for a limited

¹² Michael Pelczar et al., Institute of Museum and Library Services, *Characteristics of Public Libraries in the United States: Results from the FY 2019 Public Libraries Survey* at 4 (Aug. 2021), <https://www.imls.gov/sites/default/files/2021-08/fy19-pls-results.pdf>.

¹³ Lisa M. Frehill et al., Institute of Museum and Library Services, *Public Libraries Survey: Fiscal Year 2018* at 4 (Jan. 2021), https://www.imls.gov/sites/default/files/2021-02/fy2018_pls_tables.pdf.

¹⁴ 1 Institute of Museum and Library Services, *Public Libraries in the United States: Fiscal year 2017* at 12 (June 2020), <https://www.imls.gov/sites/default/files/publications/documents/publiclibrariesintheunitedstatesurveyfiscalyear2017volume1.pdf>.

¹⁵ *Id.*

period of time. Based on my experience working in libraries, most libraries have similar check-out periods for materials in all formats, normally 2–3 weeks. Most libraries provide at least one “renewal” check-out period for a time period that is the same as the initial loan period if there are no other requests for that item. Some libraries provide automatic renewal if an item is not returned by its due date, which is convenient for the patron and counts as a circulation. Most licensed ebooks are not eligible to be renewed, either automatically or by the patron, because of the high demand and limited supply of that format.

28. There are times when libraries may limit circulation periods on items. A good example would be limiting holiday books at Christmastime to a one-week check-out. At times, formats have had limited check-out times. For instance, when videotapes were in high demand years ago, those items had limited circulation periods. When CDs and DVDs were in great demand, those formats also had limited circulation periods. Limiting circulation periods based on format or seasonal factors is not a current practice in most libraries.

29. Meeting patron demand for all types of materials is always a challenge in libraries. Libraries maintain long waiting lists when patrons want to borrow books and ebooks, and the library does not have sufficient copies to meet that demand. Because of this imbalance of supply and demand, libraries often limit the number of books or ebooks patrons can borrow. Of course, patrons must be registered as a borrower in good standing to obtain material in person or virtually from the library.

30. The Digital Lending Library follows similar procedures as other libraries. Patrons must be registered as borrowers; they may borrow digital books for a fourteen-day period and

then access to the content expires. They can borrow up to ten books at a time and can request specific titles.¹⁶

31. The traditional process of checking out and returning library materials can be time-consuming. A traditional check-out of a physical resource required a physical trip to the library—taking up the patron’s and the library staff’s time.¹⁷

32. Providing patron access to digital content including ebooks is much simpler. Without a trip to the library, the ebook can be downloaded onto a variety of devices and is ready for use as soon as it is accessible. The ebook can be returned to the library as soon as the patron is finished with the item and prior to its due date. When the loan period is completed, patron access is automatically no longer available. (This virtually eliminates the situation common to the check-out and return process for print books—where a waitlist for a popular title is prolonged due to a patron’s late return of a book.) Borrowing ebooks is faster and more straightforward with much less “friction” than borrowing print materials.

33. The circulation function has become highly automated in recent years—for physical and digital resources. Digital resources checkout in most cases needs no staff intervention or assistance, and, for physical resources, many libraries have implemented self-check-out equipment and have automated sorting systems to re-shelve books to reduce the time staff spends facilitating patron check-outs. In addition to increasing efficiency, these systems

¹⁶ One-hour loans are also available. Those are discussed below on page 15.

¹⁷ Many libraries now have equipment that allows the patron the opportunity to personally check out their own material (self-check) but this process still requires a physical visit to the library.

decrease the staff injuries associated with the handling of physical materials.¹⁸ Ebooks eliminate staff injury entirely in addition to the other efficiencies discussed here.

4. Digital Discovery

34. One of the most impactful experiences a library can offer its patrons is the discovery of new ideas, information, and formats. Sometimes discovery occurs as the result of purposeful searching, and sometimes discovery occurs by accident or serendipity. Librarians may classify materials with standard organization systems such as Dewey Decimal or Library of Congress; and they may also organize materials by subject matter related to specific needs of the communities they serve.

35. Many patrons relish browsing the actual physical shelves for new authors, fiction, genres, or non-fiction books that may relate to a topic of interest for them or a topic new to their knowledge. Browsing and discovery are also available through the library's online catalog. Although patrons are not touching the actual material, they can browse by format, by audience (i.e. kids, teens, job-seekers), world languages, reading recommendations, and, of course, the more traditional subject search that provides access to materials based on primary subjects, somewhat similar to searching card catalogs many years ago. Library discovery platforms provide patrons the opportunity to have lists of materials they want to read, they have read, or are in the progress of reading. There are many intuitive online services to manage a patron's personal reading.

36. The discovery function for print and ebooks is different. Depending on the platforms that are being used to provide ebooks, the patron may have to check on several

¹⁸ Richard W. Boss, ALAIR, *Materials Handling Systems for Libraries* (Sept. 7, 2010), <https://alair.ala.org/bitstream/handle/11213/258/Materials%20Handling%20Systems.pdf?sequence=95>

different online locations in addition to the library's online catalog to determine if specific ebooks are available for borrowing. Librarians are constantly asking for seamless access to digital materials.¹⁹

37. Although ebook discovery can be challenging for libraries to facilitate, once discovered, digital content may be sampled to determine if the patron wants to borrow the material. For example, OverDrive offers a sampling feature that provides approximately 10% of the digital content in an ebook.²⁰

38. The Digital Lending Library offers the feature of one-hour of browsing of digital books. The one-hour digital browsing enables patrons to have access to the entire digital content of the digital book and allows them to determine if they want to borrow the digital book. If they don't borrow the digital book after the one-hour browsing period, the book is immediately checked back in and then made available for another potential reader.²¹

39. Once the patron has access to the library holdings information, if they wanted a new fiction title or discovered a new author and wanted to read more of their work, the patron, when doing an online search, which is most common, would see that the library had a print copy and/or ebook version of the title. Depending on a patron's reading format preference, they might

¹⁹ There are some new offerings in this category. SimplyE, used by the New York Public Library, is a discovery system that interacts with a variety of ebook platforms and is beginning to be used as a digital search tool in libraries throughout the United States.

²⁰ Mr. Steve Potash, founder and CEO of OverDrive, Inc, in his deposition noted that the sampling feature "enable(s) users to preview a title or to sample the book." Potash Dep. Tr. 97:8–9, Jan. 31, 2022. The amount of the sample varies depending on the ebook. In his deposition, Mr. Potash stated "In some cases with an eBook you might get not much because the whole thing is a 24-page board book, and then there are some where it seems like it's 100 pages. So it varies." *Id.* at 97:14–17.

²¹ Internet Archive, *Borrowing Books Through Open Library* (Sept. 13, 2021), <https://openlibrary.org/help/faq/borrow#how>.

place a request on the available print copy and physically retrieve it from the library. Or, if they preferred ebooks, hopefully they could download the content immediately on their device and avoid traveling to the library to retrieve the item. Particularly with popular titles and bestsellers, though the library may have both print and ebook copies of the title, all the copies are in use. Libraries have limits on the number of requests any patron can place on print books (normally fifty to one hundred); and many libraries have lower limits on the number of ebook requests (often ten to fifteen) due to the limited inventory of ebooks libraries can afford.

IV. LEVERAGING LIBRARIES' EXISTING COLLECTIONS TO SERVE THE PUBLIC

A. Interlibrary Loans, Special Collections, and the Sharing of Library Resources

40. Although libraries attempt to provide materials that their patrons want and need, this is not possible in all cases. As noted above, regional resource-sharing is common and enables patrons to borrow materials from libraries other than their primary library or the library that is geographically closest to them. Interlibrary loan is a service that addresses the situation where the patron's primary library does not have the material the patron wants. Interlibrary loan is a service that has been in place since at least 1212 when monks began developing collections for loan to other monasteries. In the late 1890's, Joseph C. Rowell, University of California, Berkeley's first full-time university librarian, established one of the first U.S. interlibrary loan systems that began as a relationship between the University of California campuses and other libraries. The framework for that system remains in place today: 1) borrowing (recipient) libraries are responsible for securing and returning books; 2) borrowing (recipient) librarians must keep detailed records of patron receipt and usage; and 3) rare or frequently used texts are

loaned at the discretion of the librarian.²² Resource-sharing among all types of libraries was identified as a national priority when the Library Services Act was passed in 1956 and resulted in the creation of regional cooperative library systems or consortia comprised of libraries from neighboring geographic areas that participated in resource-sharing and interlibrary loan.²³

41. Although interlibrary loan is a valuable service, it can be a labor-intensive process that requires much personal interaction and processing to enable borrowing materials from libraries other than the patron's primary library. The patron must contact their primary library and work with a library staff member either in person or virtually to complete a request form. Then the library staff member has to complete a form to generate the request from the owning library, process the request when the material is received, contact the patron to let them know that their requested material is available, and then facilitate the actual check-out. When the book is returned, the borrowing library has to complete the process in reverse.

42. Some libraries participate in unmediated library loan. Unmediated interlibrary loan is a service in which the patron can request the material online without requiring staff intervention at the point of the request. One example is Link+, a service which allows patrons, with no staff mediation, to request material not available at their local library. This service is available in California and Nevada, providing access to a catalog of materials from over 70 participating libraries, with access to over 9 million titles from academic, public, and special libraries. Patrons can place requests directly, no forms required, using a single online catalog

²² Nick Ripatrazone, Literary Hub, *InterLibrary Loan Will change Your Life* (Aug. 7, 2019), <https://lithub.com/interlibrary-loan-will-change-your-life/>.

²³ Library Services Act, Pub. L. No. 84-597, 70 Stat. 293 (1956), <https://www.govinfo.gov/content/pkg/STATUTE-70/pdf/STATUTE-70-Pg293.pdf>.

from the library, home or office at any time. For a variety of reasons, including the support of library system platforms, this service is not consistently available in the U.S.

43. Interlibrary loan is an amazing service for patrons searching for print materials, but the service is not currently possible with licensed ebooks. The licensing agreements that most publishers extend to aggregators like OverDrive, who then pass those requirements onto library customers, do not allow for borrowing or sharing of ebooks beyond the subscribing libraries' users. In other words, most of these licenses prevent libraries from lending ebooks to other libraries.²⁴

44. Most libraries have non-circulating collections of physical items. Libraries have collections that are unique, rare, specialized or in such delicate condition that these materials are not available for circulation. Access to these materials may be given under controlled conditions in which the library staff monitors the patron's use of the material for a limited period of time. Researchers often want to be able to see the actual physical documents—the primary source material—for their topic of interest. Even the condition of the book, notes in the columns, damages or stains, can reveal significant information that's of value to researchers.

45. Most libraries with these “special collections” have digitized, with the greatest of care, as much of this unique material as possible. Libraries often offer digitized material in the first instance, in order to limit the potential for damage to the print material. The availability of digitized materials has made a huge difference in the accessibility of this specialized and unique content. These digitized materials are not similar to ebooks that are accessed freely by patrons for convenient use.

²⁴ One exception to this is Bibliotheca, an international library vendor, which supports ebook sharing between different libraries through its “cloudLibrary” platform which is currently being tested.

46. Libraries also have reference collections comprised of print material that is not loaned due to the cost of the book, the necessity to have constant access to the book by staff to respond to inquiries, and the format of the documents, often weekly unbound paper issues that are collected in binders for patron use. Most reference materials are available online and are able to be updated in real time, unlike print materials that are often updated on a much less frequent basis.

B. Controlled Digital Lending

47. CDL is a method that allows libraries to loan print books to digital patrons in a “lend like print” fashion. Through CDL, libraries use technical controls to ensure a consistent “owned-to-loaned” ratio, meaning the library circulates the exact number of copies of a specific title it owns, regardless of format, putting controls in place to prevent users from redistributing or copying the digitized version. Controlled Digital Lending by Libraries (controldigitallending.org) includes a 2018 position paper on CDL.²⁵ The paper provides an interpretation of United States copyright law for libraries implementing traditional lending functions using digital technology that balances the public benefit of this service while protecting the interests of private rights holders. Many libraries and individuals support this statement, including Boston Public Library, Los Angeles Public Library, Multnomah County (OR) Library, San Francisco Public Library, Sacramento Public Library, and the Metropolitan New York Library Council, that includes Brooklyn Public Library, Queens Public Library, and New York Public Library.²⁶

²⁵ *Position Statement on Controlled Digital Lending* (Sept. 2018), <https://controldigitallending.org/statement>.

²⁶ *Signatories to the Position Statement on Controlled Digital Lending by Libraries*, <https://controldigitallending.org/signatories>.

48. Ex Libris, a major integrated library system vendor in the academic library integrated library system market, is promoting the value of using CDL in libraries. According to Ex Libris, key reasons for libraries to implement CDL are:

- Items are more accessible to patrons;
- Digital formats allow for enhanced functionality;
- Digital formats can aid in preservation of materials; and
- Digital lending reduces environmental impact.²⁷

49. The International Federation of Library Associations and Institutions (“IFLA”) also released a statement on CDL in 2021.²⁸ IFLA represents library members throughout the world and strongly supports CDL. IFLA identified three key principles that support the use of CDL:

- Freedom to acquire and lend represents a core function of the work of libraries;
- Digital uses should have at least the same flexibility as physical ones; and
- It is acceptable to make use of more than one copyright exception or limitation at a time.

50. IFLA notes that CDL is based on exceptions and limitations or “user rights” in copyright law, in contrast to market-based licensing solutions. IFLA believes that there is a strong socio-economic case for enabling CDL in libraries around the world. Where desirable

²⁷ Ex Libris, *Implementing Controlled Digital Lending (CDL) Responsibly and Effectively: A Primer for Librarians*, at 3, https://page.exlibrisgroup.com/hubfs/HQ_General/Ex%20Libris%20Controlled%20Digital%20Lending%20White%20Paper.pdf?hsLang=en

²⁸ IFLA, *Position on Controlled Digital Lending* (June 2, 2021), https://repository.ifla.org/bitstream/123456789/1835/1/ifla_position_-_en-_controlled_digital_lending.pdf.

and widely-shared principles are respected (libraries' ability to freely acquire and lend, the technological neutrality of law, and the possibility to combine exceptions), CDL's legal basis supports the wider public interest.

51. CDL has become an accepted practice for libraries. The use of CDL leverages the significant investment that libraries have made in developing well-rounded print collections that provide access to information their communities need. Collections that are important to be available to patrons but may not be in constant demand can be available digitally, based on the library's ownership of the print copy. Libraries are able to digitize the physical copy of a book they own, control the access to the print copy, often by putting the book in storage, and make the digital copy available to a patron, with the print copy still being owned by the library though not accessible. When accessed, these materials have limited use periods, similar to check-out times for print materials. The Digital Lending Library provides this service for their patrons.

52. Providing equitable and convenient access to digital and print materials is foundational for libraries to fulfill their primary mission of information-sharing which ultimately contributes to successful communities. CDL is a practice that supports and enhances that information-sharing function and is part of a foundation for a sustainable library ebook ecosystem.

C. The Internet Archive is a Library that Practices CDL

53. There are many definitions of libraries. The ODLIS defines a library as “[a] collection or group of collections of books and/or other print or nonprint materials organized and maintained for use (reading, consultation, study, research, etc.).”²⁹ The definition of a “public

²⁹ Joan M. Reitz, ODLIS: Online Dictionary of Library and Information Science, *Library*, (2004), https://products.abc-clio.com/ODLIS/odlis_about.aspx.

library” per the IMLS Federal-State Cooperative Program (“FSCS”) for data collection includes the following elements: 1) organized collection of materials; 2) paid staff; 3) schedule when services are available; 4) facilities to support collections; and 5) supported in whole or in part public funds.³⁰

54. The Digital Lending Library provides services to its patrons that are similar to the services other libraries provide their patrons. The Digital Lending Library provides an organized collection of material for use, with paid staff and facilities providing 24/7 access to content. Under any of these definitions, the Digital Lending Library is a library.

V. LIBRARY FINANCES

A. Organization and Funding

55. Public libraries are organized and funded in a variety of ways from a myriad of revenue sources—with local funding providing the greatest share of revenue for most. The organization, funding mechanisms, and revenue sources for libraries vary widely throughout the country.

56. Library organization varies from state to state. In California, for example, libraries are generally organized and funded in the following ways:³¹

- County libraries supported by funds dedicated for library purposes;
- County libraries supported by non-dedicated funds;

³⁰ Michael Pelczar et al., Institute of Museum and Library Services, *Characteristics of Public Libraries in the United States: Results from the FY 2019 Public Libraries Survey 1* (Aug. 2021), <https://www.imls.gov/sites/default/files/2021-08/fy19-pls-results.pdf>.

³¹ For an in-depth analysis of California public library organization and funding, California Public Library Organization 2013 is an excellent primer. The report was issued in 2013, and the organizational and funding information in the report has not changed significantly since its publication.

- Municipal (city) libraries supported by non-dedicated funds;
- Independent district libraries supported by funds dedicated for library purposes; and
- Joint Powers Authority (“JPA”) libraries organized according to an agreement between the governing boards of two or more governmental entities which may have a mix of dedicated and non-dedicated support.

57. Each state has its own unique framework for organizing libraries. In Maryland, library services can only be provided by a county library system.³² Types of public libraries in New York State include Association Public Libraries, Municipal Public Libraries, School District Public Libraries, and Special Legislative District Public Libraries.

- An association public library is a private corporation established by the members of the association. It contracts with a unit of local government to provide library service to the residents of that jurisdiction and is supported by public funds.
- A municipal public library is formed either by a vote of the governing body of a municipality (village, town, city, or county) or by a public referendum to serve the residents of the municipality and is supported by public funds.
- A school district public library is organized to serve the residents who live within the boundaries of a given school district (hence the name). The library and the library board are independent of the school district and the school board.
- A special district public library is created by a special act of the New York State Legislature and a local public vote, to serve all or part of one or more

³² The exception to this is the Enoch Pratt Free Library in Baltimore, which serves as a resource to all libraries in Maryland.

municipalities as defined by the special legislation and is supported by public funds.³³

58. Most libraries are supported with general public funds that are managed by a municipality (a city or county, whichever serves as the host agency for the library). These funds are budgeted annually to support the operations of the library by actions of the governing body and are not specifically earmarked for the library. In some cases, there are dedicated funds for the library that are often a result of voter-approved taxes. These dedicated funds may come from additional property tax levies, sales taxes, hotel or transient occupancy taxes, or other forms of revenue. Some of these revenue sources are established in perpetuity yet most of these special sources are time-limited, requiring regular elections for continuation or may be subject to caps on amount of taxes that can be levied. Often you will find a combination of general property tax support supplemented by an additional revenue source for library operations. There also may be unique funding sources for library-related capital projects.

59. The amount of funding for libraries varies greatly. IMLS collects data annually on library funding. Data is shown in the chart below:

Sources of Library Funding (Per Capita)

FY 2019 IMLS³⁴	Total	Federal	State	Local	Other
Average	\$44.88	\$0.12	\$2.99	\$38.55	\$3.21
New York	\$79.65	\$0.25	\$3.27	\$65.54	\$10.59
California	\$43.74	\$0.08	\$0.53	\$40.73	\$2.40

³³ Rebekkah Smith Aldrich, Handbook for New Public Library Directors in New York State, 18–19 (2010), http://midhudson.org/directors_handbook.pdf.

³⁴ Institute of Museum and Library Services, *Public Libraries Survey* “FY 2019: Table 8. Total per capita operating revenues of public libraries” (2021), <https://www.imls.gov/research-evaluation/data-collection/public-libraries-survey>.

FY 2019 IMLS³⁴	Total	Federal	State	Local	Other
Texas	\$22.44	\$0.07	NA	\$21.53	\$0.83

60. This data shows per person operating revenues aggregated at the state level. The primary source of funds for all public libraries is local, with state and federal funds providing limited support. Funds in the “other” category include monetary gifts and donations received in the current year, interest, library fines, fees for library services, or grants. There are disparities in available funding at all levels.

61. Funding levels can depend on local economic conditions, local priorities, or non-discretionary services that must be provided. Unlike police or fire protection, library services are discretionary and not required to be provided by governmental entities. Based on my experience, I have seen that the discretionary nature of library services results in inconsistent funding levels that are often in competition with local services that are required or seen as more critical for the community. For instance, during difficult budget times in 2016, the Kern County (California) District Attorney suggested that all branch libraries be closed to fund law enforcement.³⁵ Although the libraries did not close in this situation, there are other situations where libraries and their patrons suffer funding and service losses.

62. Most libraries operate on a fiscal year³⁶ that is set by their host agency. Depending on the source of funds, the library may or may not be able to retain funds if they were

³⁵ Jeffrey Hess, KVPR, *Kern County Libraries Face Uncertain 2017* (Dec. 20, 2016), <https://www.kvpr.org/education/2016-12-20/kern-county-libraries-face-uncertain-2017>.

³⁶ A common fiscal year for public institutions is July through June, yet there are some jurisdictions that operate on a calendar fiscal year or the federal fiscal year, which is October through September.

allocated in a fiscal year and not all spent in that fiscal year. In other words, for most sources of funding libraries have to spend their budget each year. They lose any leftover money.

63. Libraries with dedicated taxes usually can retain or “carryover” any unspent funds from one fiscal year to the next whereas libraries with general, non-specific support are likely to be required to return any unspent funds from a fiscal year to the host agency. If libraries are allowed to “carry over” unspent funds, they have additional flexibility to allocate funds. Independent library districts have their own taxing authority and can manage funds as they determine most appropriate for their services. These districts have more stable and predictable funding patterns compared to libraries that are affiliated with their local cities or counties.³⁷

B. Library Budget Trends

64. In reviewing budget trends for libraries, the IMLS Public Libraries Survey provides clear comparisons. The most recent information available in the IMLS survey is from FY 2019 (July 2018 – June 2019). Comparisons in revenues and expenditures per person based on data for all public libraries in the U.S. can be reviewed in the chart below:

Comparisons in Revenue and Expenditures for U.S. Public Libraries

Fiscal Year	Total Revenue	Revenue per Person	Total Operating Expenditure	Expenditure per Person
FY 2019 ³⁸	\$14.2 B	\$44.88	\$13.3 B	\$41.90
FY 2015 ³⁹	\$12.42 B	\$39.94	\$11.62 B	\$37.38

³⁷ Lisa Peet, Library Journal, *Holding Pattern: Budgets and Funding* (Feb. 16, 2018), <https://www.libraryjournal.com/story/holding-pattern-budgets-funding>.

³⁸ Michael Pelczar et al., Institute of Museum and Library Services, *Characteristics of Public Libraries in the United States: Results from the FY 2019 Public Libraries Survey* at 3 (Aug. 2021), <https://www.imls.gov/sites/default/files/2021-08/fy19-pls-results.pdf>.

³⁹ Institute of Museum and Library Services, *Public Libraries in the United States: Fiscal Year 2015* at viii (July 2018), <https://www.imls.gov/sites/default/files/publications/documents/plsfy2015.pdf>.

Fiscal Year	Total Revenue	Revenue per Person	Total Operating Expenditure	Expenditure per Person
FY 2011 ⁴⁰	n/a	\$38.09	n/a	\$35.83

65. Both total and per person revenues and operating expenditures have increased over the last nine years but not significantly. The revenues and expenditures over a five-year period have increased by about 13%. Increases in library budgets, both revenue and expenditures, vary. In 2018, the predicted increase for public library budgets was 1.9%, slightly better than the 2017 prediction of 1.4%, but not beating the predicted 2018 inflation rate of 2.38%.⁴¹ Assuming a 1.5% annual average budget increase for most libraries, this five-year period would have resulted in a 7.5% increase for most libraries. Please note that these are national averages and the per person revenues and expenses can vary greatly depending on the economic resources of the local area. For instance, in FY 2020 in California, the Beverly Hills Public Library reported the highest per person expenditures in the state at \$390.15 while the Pomona Public Library reported the lowest per person expenditures in the state at \$5.33.⁴²

66. Libraries have faced a number of funding-related challenges in the last ten to fifteen years. Libraries suffered reduced funding in the “great recession of 2008-09” when many public agencies were challenged. Some libraries recovered within the next ten years. Often

⁴⁰ Deanne W. Swan et al., Institute of Museum and Library Services, *Public Libraries in the United States Survey: Fiscal Year 2011* at 29 (June 2014), <https://www.imls.gov/sites/default/files/legacy/assets/1/AssetManager/PLS2011.pdf>.

⁴¹ Lisa Peet, Library Journal, *Holding Pattern: Budgets and Funding* (Feb. 16, 2018), <https://www.libraryjournal.com/story/holding-pattern-budgets-funding>.

⁴² California State Library Statistics Portal, *Total Expenditures per Capita* (2022), <https://ca.countingopinions.com/pireports/report.php?bd779312f73ab509cdef26ddf21a92b6&live>.